Ill. Temp Labor Rules: No Clear Road Map For Compliance

By **Alexis Dominguez and Alissa Griffin** (December 8, 2023)

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After Illinois Gov. J.B. Pritzker signed significant amendments to the Illinois Day and Temporary Labor Services Act into law on Aug. 4, many Illinois staffing agencies and their third-party clients scrambled to make sense of the myriad of vague requirements imposed by the amendments.

The amendments have been widely criticized as ambiguous — often creating more questions than answers as to the steps employers must take to comply.

At present, there is no clear road map for compliance with the amendments.

Fortunately, recently enacted legislation delays the effective date of one of the more onerous provisions of the amendments — the equal pay for equal work requirement set forth in Section 42 — to April 1, 2024.

Not only does this delay provide staffing agencies and their third-party clients with temporary relief from the amendment's equal pay for equal work provision, it offers hope to affected employers that the Illinois Department of Labor, or IDOL, will use this additional time to address some of the many questions about the amendments.

H.B. 3641 Delays Equal Pay Requirements

On Nov. 9, during the final veto session of the year, the Illinois Legislature passed H.B. 3641, which, among other things, amended the equal pay for equal work provision of the amendments to include the clarifying statement that, "[f]or the purposes of this Section, the calculation of the 90 calendar days may not begin until April 1, 2024."

H.B. 3641 was signed into law by Pritzker the following week, on Nov. 17. Consequently, the equal pay for equal work provision will not go into effect for another five months.

The Equal Pay for Equal Work Provision

The equal pay for equal work provision requires temporary labor service agencies to provide day and temporary laborers with equivalent pay and benefits to the lowest paid, directly hired comparator employee employed by the client employer after 90 calendar days of work.

The provision specifies that, in lieu of providing the actual benefits, the agency can choose to pay the laborer the hourly cash equivalent of the actual costs of the benefits.

To facilitate the calculation of the equivalent pay and benefits owed to temporary laborers, third-party clients are required to provide temporary labor service agencies with information related to job duties, pay and benefits of directly hired employees upon request.

Immediately following its passage, the amendments' equal pay for equal work provision, in particular, raised a number of concerns for employers.

Staffing agencies and their clients found themselves asking questions ranging from: "How do we determine what is and is not a benefit?" to "What factors determine who is and is not a comparator employee to a particular laborer?" to "How do you calculate the monetary equivalent of a particular benefit?" Employers were left with very few clear answers.

While IDOL has since issued emergency rules, which define benefits to include "health care, vision, dental, life insurance, retirement, leave (paid and unpaid), other similar employee benefits, and other employee benefits as required by State and federal law," the current guidance fails to provide a clear road map for compliance with the amendment's equal pay for equal work requirements.

Terms such as "other similar employee benefits" have not been defined and the department has not provided any direction for calculating the monetary worth of certain employee benefits, which are not easily quantified.

Notably, on Sept. 12, the Joint Committee on Administrative Rules, or JCAR, issued objections to the emergency rules and proposed rules, noting that the rulemaking "is too vague to provide meaningful guidance to employers looking to comply with its requirements, especially small businesses."

JCAR also noted that, "[b]y not using clear standards that are applicable to all sizes of employers for purposes of determining comparators and calculations for hourly cash equivalents of benefits, the Department has created immediate confusion."

The Illinois rulemaking process requires that IDOL respond to JCAR within 90 days of the issuance of its objections.

In the event that no response is issued, the Illinois rulemaking process prohibits the proposed rules from taking effect.

On Sept. 28, a few days following JCAR's objections, the department held a public hearing to solicit public comments on the proposed rules governing the act.

While the department has not yet issued a formal response to JCAR's objections, it seems that the department is working toward resolving some of the confusion surrounding the amendments to the act.

For example, IDOL has published a Day and Temporary Labor Service Agency FAQ.[1]

The FAQ clarifies that the 90-day count "includes only days worked by a day or temporary laborer for the third-party client within a 12-month period, not simply the total duration of the contract or assignment."

Importantly, even a minimal amount of time worked on a given day will count toward the 90-day total.

The FAQ also expands upon the requirement to provide "equivalent benefits" and notes this will include "the same automatic benefits as direct-hire employees, and the same opportunity to opt-in for the other voluntary benefits."

Notwithstanding these clarifications, additional guidance is needed to ensure employers have the information necessary to comply with the amendments going forward.

Significance of the Equal Pay for Equal Work Provision Delay

Fortunately for employers, the delay of the equal pay for equal work provision of the amendment provides some breathing room for companies subject to the act.

Importantly, H.B. 3641 delays the start of the 90-day calculation period for the equal pay for equal work obligations until April 1, 2024.

While this delay is a step in the right direction and a welcome reprieve for staffing agencies and their third-party clients, it is important to keep in mind that H.B. 3641 only affects the equal pay for equal work provision of the act's amendments.

It does not affect or delay any other provision of the amendments.

Therefore, staffing agencies and their third-party clients should remain vigilant in their efforts to comply with the act and its amendments.

Additional Employer Obligations from Amendments

Because H.B. 3641 only delays the effective date of the 90-day period for equal pay and benefits, it is important that staffing agencies and their clients remain mindful of the other requirements imposed by the act's amendments, which include the following.

Safety-Related Requirements

Under the amendments, third-party clients must now disclose their safety and health practices as well as all known location-specific hazards to the day and temporary labor services agency before the agency dispatches a laborer to the client's worksite.

No day or temporary laborer may be asked to work at a work site with a job hazard known by the day and temporary labor services agency, unless the job hazard has been fixed or addressed by the third-party client prior to the assignment.

Before assigning a laborer to work, the temporary labor service agency must provide the laborer with general safety training for industry hazards he or she may encounter at the work site; the department's hotline number for reporting safety hazards; and information regarding how the laborer should report safety concerns at the workplace.

Additionally, before a laborer can begin work at a third-party client's work site, the client company must:

- Disclose anticipated job hazards the laborer may encounter;
- Ensure that the safety and health awareness training the agency provided the laborer properly addressed any recognized hazards at the client company's work site;
- Conduct training tailored to any hazards specific to the client's work site; and

- Maintain records of site-specific training and provide confirmation the training occurred to the temporary labor services agency within three business days of providing the training to the temporary laborer.

The amendments also permit laborers to refuse an assignment at a third-party client where a labor dispute, such as a strike or lockout, exists.

A laborer's refusal to perform work at a site where a labor dispute exists may not negatively affect the laborer's opportunities for future work.

Private Right of Action for Interested Parties

In addition to these and other new obligations imposed by the amendments, the act now contains an expanded private right of action, which grants interested parties the right to initiate a civil action against temporary labor service agencies and their third-party clients.

An "interested party" is defined by the emergency rules and the FAQ as "an organization that monitors or is attentive to compliance with public or worker safety laws, wage and hour requirements, or other statutory requirements."

Thus, independent compliance monitors can now assert Day and Temporary Labor Services Act claims on behalf of third parties, expanding potential employer liability under the act.

Prior to initiating a civil action, the interested party must file a complaint with IDOL.

In response, the department will send a notice of the complaint to the named parties, which will then have 30 days to contest or cure the allegations in the complaint.

If the named parties do not cure or respond to the notice within 30 days, then the department will issue a right to sue letter to the interested party.

This process largely mirrors the process employees must go through to bring certain discrimination claims through administrative agencies prior to filing a civil action, and is expected to play out similarly.

Practical Next Steps

While we await further guidance from the department concerning the act's amendments, staffing agencies and their third-party clients should take steps to ensure compliance with the act.

It will be important to review any workplace safety training to ensure they meet the requirements under the amendments.

Also, staffing agencies and their clients should document all pay and benefits-related information for employees at the client's work site.

While H.B. 3641 provides employers with additional time to comply with the equal pay for equal work provision, having documentation on hand will simplify compliance efforts come April 1, 2024.

Generally, any agreements between staffing agencies and their clients should be reviewed

for any indemnification-related considerations, in light of the blurred lines between the obligations created by the amendments.

Finally, all good faith efforts to comply with the amendments should be documented.

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[1] https://labor.illinois.gov/faqs/day-temp-labor-faq.html.